

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

FILED

APR 22 2016

Clerk, U.S. District Court
District Of Montana
Billings

EDWIN A. SHEARER,

Petitioner,

vs.

LEROY KIRKEGARD; ATTORNEY
GENERAL OF THE STATE OF
MONTANA,

Respondents.

CV 16-04-BLG-SPW

OPINION and ORDER

Petitioner Edwin Shearer, a state prisoner proceeding pro se, petitioned this Court for a writ of habeas corpus seeking to vacate his state court conviction. In claims one through six, Shearer alleges that the state trial court committed several errors. In his seventh claim, Shearer alleges that his trial and appellate attorneys rendered ineffective assistance of counsel. While Shearer pursued a direct appeal of his conviction, he did not raise these issues before the Montana Supreme Court. At the time the Petition was filed, Shearer had not petitioned for postconviction relief in the state trial court.

In two separate instances, United States Magistrate Judge Carolyn Ostby advised Shearer that his claims appeared procedurally defaulted. Shearer did not fully exhaust his ineffective assistance of counsel claim in state court, but that it

appeared that he could still present it in state court. Judge Ostby also advised Shearer that claims one through six appeared procedurally defaulted because they were not presented on direct appeal. Judge Ostby afforded Shearer an opportunity to attempt to excuse this procedural default. Shearer responded that he wished to withdraw his ineffective assistance of counsel claim to further pursue it in state court. However, Shearer indicated that he wished to proceed on the merits of claims one through six before this Court.

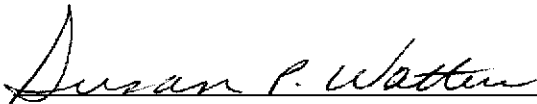
On March 28, 2016, Judge Ostby issued Findings and Recommendations, in which she recommends that this Court dismiss Shearer's petition with prejudice due to Shearer's inability to excuse his procedural default. In response to the Findings and Recommendations, Shearer acknowledges that he should have first exhausted his state remedies. Shearer requests that this Court dismiss his petition without prejudice so it can be refiled at a later date.

As Shearer still has not provided an excuse for not bringing claims one through six in state court, this Court will dismiss those claims with prejudice. Shearer has not shown a reason why he should be allowed to bring those claims in federal court. The Court agrees to dismiss Shearer's ineffective assistance of counsel claims without prejudice. However, the Court notes that this claim might be time-barred if Shearer attempts to refile this claim in federal court.

Accordingly, IT IS HEREBY ORDERED:

1. Judge Ostby's Findings and Recommendations (Doc. 7) are ADOPTED
IN FULL with the exception that Shearer's ineffective assistance of
counsel claim will be dismissed without prejudice.
2. The Petition (Doc. 1) as to claims one through six is DISMISSED WITH
PREJUDICE. The Petition's ineffective assistance of counsel claim is
DISMISSED WITHOUT PREJUDICE.
3. The Clerk of Court shall enter judgment in favor of Respondents and
against Petitioner as to claims one through six. The Clerk of Court shall
enter a judgment of dismissal on claim seven.
4. A certificate of appealability is DENIED.

DATED this 21st day of April, 2016.



SUSAN P. WATTERS
United States District Judge